DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202083 DATE: October 28, 1982

MATTER OF: S.S. Silberblatt, Inc. v. East Harlem Pilot Block--Payment of Judgment

DIGEST: Secretary of Housing and Urban Development (HUD) provided building mortgage insurance on two projects under authority of section 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (1976). In one case, the Secretary agreed to make payments to plaintiff construction contractor in settlement of lawsuit after court had ruled that the contractor had cause of action against the Secretary on the theory of quantum meruit. In the second case, similar payment was directed by court judgment. The permanent indefinite appropriation established by 31 U.S.C. § 724a is not available in either case. The permanent appropriation may be used to pay a judgment or compromise settlement only if no other funds are available for that purpose. The Special Risk Insurance Fund, a revolving fund created by 12 U.S.C. § 1715z-3(b), is available for the payments to contractors for completion of projects for which HUD has provided mortgage insurance under section 236.

The issue has arisen of whether the compromise settlement in S.S. Silberblatt, Inc. v. East Harlem Pilot Block, et al., and the judgment in Bronson and Popoli, Inc. v. Enoch Star Restoration Housing Development Fund Co., Inc., are payable from the permanent indefinite appropriation established by 31 U.S.C. § 724a or from funds available to the Department of Housing and Urban Development (HUD). The question of the proper source of funds first arose when the Silberblatt settlement was submitted to this Office for certification for payment under 31 U.S.C. § 724a in September 1980. At that time, in view of the substantial legal issues involved, we agreed to certify the settlement for payment under 31 U.S.C. § 724a and HUD agreed to reimburse the appropriation if we later decided that it was not available. Subsequently, the judgment in Bronson, a case very similar to Silberblatt, was submitted. Our agreement with HUD was extended to cover Bronson, and we certified that judgment for payment on the same basis.

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Since certification of the Bronson judgment, HUD has formally submitted its views concerning the proper source of payment, which we have fully considered. For the reasons stated below, we hold that the Special Risk Insurance Fund which is available to the Secretary, is the proper source of funds in cases like Silberblatt and Bronson.

Facts

Silberblatt was a suit brought by a general contractor seeking payment for work he had performed on the Taino Towers housing project in New York. HUD had provided mortgage insurance for the project under the authority of section 236(j) of the National Housing Act, 12 U.S.C. § 1715z-1(j) (1976).

Construction of the project was halted when the owner, East Harlem Pilot Block, defaulted on its mortgage loan payments. The lender collected its mortgage insurance benefits from HUD and assigned the mortgage proceeds to HUD. HUD then entered into an agreement with the mortgagors that it would become mortgagee-in-possession and would contract with a private developer (Silberblatt) for completion of the projects. Under the agreement, the mortgagor would regain possession of the projects after the developer completed construction and HUD would restructure the mortgage to cure the default.

The contractor brought suit against the owner, the lender, and against HUD as insurer, seeking payment for the work he performed on the project. The United States District Court for the Southern District of New York granted motions for summary judgment in favor of the Secretary and the project owner, and dismissed the claim against the lender. 460 F. Supp. 593 (1978). The Court of Appeals for the Second Circuit reversed the granting of summary judgments in favor of the Secretary and the owner. 608 F. 2d 28 (1979). The court found that HUD had been enriched by the contractor's efforts even though it technically was not the owner of the project. The court held that the contractor was not prohibited from seeking recovery from the Secretary on a theory of quantum meruit, and it remanded the case to the district court.

After the Second Circuit's decision, the parties entered into a settlement agreement in which HUD agreed to pay approximately $4.16 million to satisfy the claims of the general contractor and the subcontractors for the work done in completing the project.

The relevant facts in Bronson and Popoli, Inc. v. Enoch Star Restoration Housing Development Fund Co., Inc. are very similar to those in Silberblatt. Bronson was a suit by contractors for expenses incurred in the construction of the Enoch Star Housing Project. The District Court for the Eastern District of New York, in a memorandum decision dated July 1, 1980 (No. 77 C 44), followed Silberblatt and ordered judgment entered against the Secretary in the amount of $750,000.

Discussion and Conclusion

HUD provided mortgage insurance for the Taino Towers and the Enoch Star Housing Projects in furtherance of the program established under 12 U.S.C. § 1715z-1(j). That subsection authorizes a Federal mortgage insurance program for multifamily rental and cooperative housing projects for lower-income, elderly or handicapped families. Congress established the Special Risk Insurance Fund as a revolving fund to finance the program as well as other Federal housing programs.

31 U.S.C. § 724a establishes a permanent indefinite appropriation to pay judgments against the United States generally. However, 31 U.S.C. § 724a expressly provides that the permanent appropriation is only available to pay judgments "not otherwise provided for." Accordingly, the permanent appropriation may not be used if another appropriation or fund is legally available to pay the judgment in question.

It has long been our view that when Congress authorizes an agency to conduct a "business-type" program, empowers the agency to "sue and be sued" with respect to that program, and creates a revolving or other special fund to finance the program, then judgments arising from the operation of the program (as opposed to judgments which are common to all agencies such as tort or discrimination judgments) should be paid by the agency from program funds. Such judgments are viewed simply as "necessary expenses" of the program for which program funds are available. See, for example, our letter to the Administrator of the Small Business Administration, B-189443, August 4, 1980. In this sense, payment is "otherwise provided for." In fact, as will be discussed later, the Silberblatt and Bronson holdings were based explicitly on the existence of funds under HUD's control or discretion.

The Special Risk Insurance Fund created by 12 U.S.C. § 1715z-3(b) is available for judgments like Silberblatt and Bronson; therefore, the permanent appropriation may not be used.

We have twice found that HUD Insurance Fund money may be used to pay project construction costs. In 54 Comp. Gen. 1061 (1975), we held that HUD's insurance funds--the Special Risk Insurance Fund or the General Insurance Fund (12 U.S.C. § 1735e), depending on the section under which the particular project was insured--were available for the purpose of making repairs to multifamily projects after the HUD-insured mortgages had gone into default and subsequently been assigned to the Secretary. We issued the decision at the request of HUD's Office of General Counsel which urged that we allow such expenditures. We based our conclusion upon the last sentence of 12 U.S.C. § 1713(k) which governs the Secretary's rights as assignee of an insured mortgage. It provides:

> "Pending such acquisition by voluntary conveyance or by foreclosure, the Secretary is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve and protect the lien of such mortgage."

We held that the provision did not require that the Secretary be contemplating foreclosure when he makes repair expenditures from the Fund. We concluded that the Secretary could make the expenditures until the default was cured or until HUD acquired title, provided that one event or the other occurred within a reasonable time after the expiration of 1 year from the default.

In August 1979, during the course of our audit work, we had occasion to consider informally whether our decision at 54 Comp. Gen. 1061 and the provisions of the National Housing Act allowed the Secretary to expend insurance funds to complete (in addition to repair) a project after the mortgagors defaulted and the mortgage was assigned. We found that several subsections of 12 U.S.C. § 1713 authorized such expenditures.

We noted that 12 U.S.C. § 1713(g) recognizes that the fund is available to pay project completion costs. The subsection governs the payment of insurance benefits to the original mortgagee after a default. It states that in addition to the amount of mortgage money expended, the mortgagee is entitled to reimbursement from the fund for taxes, property insurance and for reasonable expenses for the completion of the property. A memorandum from our General Counsel to our Community and Economic Development Division (B-171630-O.M., August 22, 1979), concluded:

> "Thus, this provision recognizes that the rights of a mortgagee include the right to construct, improve, or repair the mortgaged premises. Significantly, these expenses are expressly reimbursable from the General Insurance Fund. Consequently, the Secretary's rights as mortgagee under section 1713(k) should also include these rights and the necessary expenditures should be chargeable to the General Insurance Fund."

The availability of the insurance funds for the types of payments involved in Silberblatt and Bronson is a logical application of our previous conclusions.

HUD argues that the legislative history of Pub. L. No. 87-187, 75 Stat. 416 (1961) indicates that the appropriation made by 31 U.S.C. § 724a was intended to be the source of payment in cases such as Silberblatt and Bronson. Public Law 87-187 amended section 724a by adding that compromise settlements, in addition to final judgments, could be paid from the judgment fund. HUD refers to a letter from the Department of Justice which recommended the amendment (reprinted in

[1961] U.S. CODE CONG. & AD. NEWS, pg. 2439). HUD interprets the Department's letter as stating that the purpose of the amendment was to prevent delay in the payment of compromise settlements which is caused by the agency concerned having to interpret its authorizing and appropriations legislation to determine if it has funds available. HUD points out that there would have been such a delay in Silberblatt if we had not agreed to proceed with payment and then settle the question as to the proper source of funds. HUD's view is, in effect, that agency funds are not available for compromise settlements if "time-consuming" legislative interpretation is required.

We disagree. An examination of the origin of the judgment fund indicates otherwise. Prior to the enactment of the statute which created the judgment fund, a person who had a judgment against the United States could be paid only if Congress appropriated funds specifically for the payment of his judgment. Congress viewed this method of paying judgments as unsatisfactory because it resulted in persons who had a right to Government funds having to wait an unduly long time to receive their money and because it resulted in unnecessary administrative expense and interest costs due to the delay. (Hearings on Supplemental Appropriations Bill, 1957, Before Subcommittees of the House Committee on Appropriations, 84th Cong., 2d Sess., pt. 2 at 883 (1956).)

Accordingly, Congress established a permanent indefinite appropriation which allowed for the immediate payment of judgments. However, in so doing, Congress provided that where another appropriation or fund was available to pay the judgment, the appropriation would not be used. The reason for this is that it would not be necessary to provide for the immediate payment of a judgment for which funds were already available.

The phrase "not otherwise provided for" should be interpreted in light of the congressional purpose for creating the judgment fund. The fact that it might be necessary to do some statutory interpretation to determine if a particular appropriation is available to pay a judgment or compromise settlement does not preclude use of that appropriation. We have, on a number of occasions, interpreted statutory schemes to find that the payment of a judgment was "otherwise provided for." 56 Comp. Gen. 615 (1977); 52 Comp. Gen. 175 (1972); B-129072, October 22, 1974.

In addition, the 1961 amendment which added "compromise settlements" to 31 U.S.C. § 724a (Pub. L. No. 87-187, supra) was intended to serve a very narrow purpose. When 31 U.S.C. § 724a was first enacted in 1956, it applied only to judgments and not to compromise settlements. Thus, as to situations not otherwise provided for, judgments could be paid promptly while compromise settlements continued to require specific congressional appropriations. To avoid what many viewed as an incongruity, it became common in the late 1950's to reduce compromise settlements to consent judgments, for the sole purpose of taking advantage of the prompt payment mechanism of section 724a. The 1961 amendment cured this situation by making the judgment appropriation available for compromise settlements to the same extent that it was already available for judgments in similar cases. (It also added certain judgments and compromise settlements of State and foreign courts, not relevant here.) The "delay"

referred to throughout the legislative history of 31 U.S.C. § 724a and subsequent amendments means delay in obtaining specific appropriations, not delay in analyzing and construing statutes to determine the proper source of funds.

HUD also contends that the Special Risk Insurance Fund is merely "similar to an insurance reserve maintained at a sufficient level to satisfy claims against insurance policies as they mature at an actuarially predictable rate." HUD argues that the legislative history of 12 U.S.C. § 1715z-3(b) which establishes the Fund does not indicate that Congress contemplated using it for broader purposes such as the payments in the Silberblatt and Bronson cases.

Our examination of the legislative history indicates otherwise. Congress passed section 1715z-3 creating the Special Risk Insurance Fund as part of the Housing and Urban Development Act of 1968, which added a new section 238 to the National Housing Act. (Pub. L. No. 90-448, section 104(a), 82 Stat. 487, Aug. 1, 1968.) The Banking and Currency Committee of the House of Representatives, in its report on the bill later enacted as Public Law 90-448, explained the section creating the fund as follows:

"SPECIAL RISK INSURANCE FUND

> "Section 104 of the bill would establish, through a new section 238 of the National Housing Act, a 'Special Risk Insurance Fund,' which would not be intended to be actuarially sound and out of which claims would be paid on mortgages insured under the new sections 235--homeownership assistance (proposed by sec. 101 of the bill); 236--assistance for rental and cooperative housing (proposed by sec. 201 of the bill); 237--credit assistance (proposed by sec. 102 of the bill); as well as those mortgages insured pursuant to the authority contained in the amendments to section 223--properties in older, declining urban areas (proposed by sec. 103 of the bill) and section 233--development of new technologies for lower income housing (proposed by sec. 108 of the bill).
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> "The fund would be established with a $5 million advance from the general insurance fund, which would be repayable at such time and at such interest rates as the Secretary of HUD deemed appropriate. Since these programs cannot be expected to be operated on an actuarially sound basis if the insurance premium charge is to be set at a reasonable level, appropriations to the fund would be authorized to cover any losses sustained by the fund in carrying out the mortgage insurance obligations of these programs. The term, losses, as used in this provision, is the same as presently appears in a similar authority under section 221(f) of the National Housing Act. In both instances, it is intended that the Secretary be able to obtain appropriations to cover anticipated or projected losses as well as actual losses, in order to provide adequate operating funds during the long period required to liquidate properties.

> "Insurance benefits would generally be similar to those authorized for mortgages insured under section 221 of the National Housing Act. Payments on claims would be made either in cash or debentures and could be in an amount equal to the unpaid principal balance of the loan plus any accrued interest and any advances made by the mortgagee with approval of the Secretary and under the provisions of the mortgage, where permitted in the regulations prescribed by the Secretary. Income such as insurance premiums and service charges in connection with the covered programs would be deposited in the new fund. Administrative expenses in connection with these programs and expenses incurred with respect to defaults would be charged to the fund." H.R. Rep. No. 1585, 90th Cong., reprinted in U.S. CODE CONG. AD. NEWS, 2873, 2885). (Emphasis added.)

In view of the above-quoted language and legislative history, while HUD's contention that the fund is "similar to an insurance reserve maintained at a sufficient level to satisfy claims against insurance policies as they mature at an actuarially predictable rate" may be true for the most part, it does not exclusively define the limits of the fund's availability.

Finally, HUD contends that the fact that Congress saw fit to waive sovereign immunity for HUD by authorizing the Secretary to sue and be sued in connection with the section 236 program does not, in and of itself, mean that any judgments against the Secretary are not to be satisfied from the judgment fund. HUD notes that "allowing suits against an agency is an entirely different matter from appropriating the money to pay judgments and settlements of such suits."

This is an issue the Silberblatt and Bronson courts addressed. Following the Supreme Court's guidance in F.H.A. v. Burr, 309 U.S. 242 (1940), the Silberblatt court stated:

> "For a claim to be against the Secretary, and therefore within the scope of the 'sue and be sued' clause, as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds. [Citation omitted.] This requirement is satisfied if the judgment could be paid out of funds appropriated under the National Housing Act and in the control or subject to the discretion of the Secretary. * * *" 608 F.2d at 36.

The Bronson court followed Silberblatt, holding as follows:

> "The Silberblatt court also held that a judgment against the Secretary could be paid out of 'funds appropriated under the National Housing Act and in the control or subject to the discretion of the Secretary.' * * * Because there are funds in the control of the Secretary which are available to pay the judgment in the present case, the Court need not consider whether it has the power to enter a judgment in the absence of such funds." E.D.N.Y., No. 77 C 44, mem. op. at 5-6 (July 1, 1980).

We are aware that the Ninth Circuit has taken a different view. Marcus Garvey Square, Inc. v. Winston Burnett Construction Co., 595 F. 2d 1126 (9th Cir. 1979). However, the weight of judicial authority seems to be in accord with Silberblatt. Industrial Indemnity, Inc. v. Landrieu, 615 F. 2d 644 (5th Cir. 1980); Trans-Bay Engineers & Builders, Inc. v. Hills, 551 F. 2d 370 (D.C. Cir. 1976). We agree with the "majority view" as expressed in Silberblatt.

In accordance with the foregoing, we conclude that judgments and compromise settlements in cases arising from HUD's various mortgage insurance programs, including situations like Silberblatt and Bronson, are payable from the insurance funds applicable to those programs, and not from the permanent judgment appropriation.

Milton J. Socolar

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